



## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 216**

#### **RTID 0648-XC604**

### **Implementation of Import Restrictions; Certification of Admissibility for Certain Fish Products from New Zealand**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Import restrictions.

**SUMMARY:** Under the authority of the Marine Mammal Protection Act (MMPA), and pursuant to a court order, the NMFS Assistant Administrator for Fisheries (Assistant Administrator) has implemented import restrictions on the products harvested in certain Government of New Zealand (GNZ) regulated fisheries: West Coast North Island multi-species set-net fishery, and West Coast North Island multi-species trawl fishery. Similar fish products harvested from other areas or with other types of fishing gear are eligible for entry into the U.S. market only when accompanied by Certification of Admissibility validating origin from other than the restricted fisheries.

**DATES:** These import restrictions and requirement for Certification of Admissibility are effective December 5, 2022, until revoked or revised by the Assistant Administrator in a subsequent action.

**FOR FURTHER INFORMATION CONTACT:** Kellie Foster-Taylor, NMFS Office of International Affairs, Trade, and Commerce at [kellie.foster-taylor@noaa.gov](mailto:kellie.foster-taylor@noaa.gov) or 301–427–7721.

**SUPPLEMENTARY INFORMATION:**

### *The MMPA Import Provisions*

The MMPA, 16 U.S.C. 1371 *et seq.*, states that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying this import restriction, the Secretary of Commerce shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.

In August 2016, NMFS published a final rule (81 FR 54390; August 15, 2016) implementing the fish and fish product import provisions in section 101(a)(2) of the MMPA. This rule established conditions for evaluating a harvesting nation's regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in fisheries operated by nations that export fish and fish products to the United States. Under the final rule, fish or fish products may not be imported into the United States from commercial fishing operations that result in the incidental mortality or serious injury of marine mammals in excess of U.S. standards (16 U.S.C. 1371(a)(2)). NMFS published a List of Foreign Fisheries (LOFF) on October 8, 2020 (85 FR 63527), to classify fisheries subject to the import requirements.

The final rule established a five-year exemption period, through December 31, 2021, before imports would be subject to any trade restrictions (see 50 CFR 216.24(h)(2)(ii)). In recognition of the diversion of foreign government resources away from fishery research and regulatory programs in response to the COVID pandemic, NMFS issued an interim final rule to extend the exemption period through December 31, 2022 (85 FR 69515, November 3, 2020). Subsequently, NMFS issued a final rule to

extend further the exemption period through December 31, 2023 (87 FR 63955, October 21, 2022) due to the large number of foreign nation applications for comparability findings received and the need to evaluate regulatory programs fairly and equitably for more than 2500 foreign fisheries.

In the 2016 final rule, NMFS stated that it may consider emergency rulemaking during the exemption period to ban imports of fish and fish products from a foreign fishery having or likely to have an immediate and significant adverse impact on a marine mammal stock. In addition, pursuant to the MMPA Import Provisions rule, nothing prevents a nation from implementing a bycatch reduction regulatory program and seeking a comparability finding during the exemption period. The GNZ requested that NMFS consider comparability findings for certain fisheries prior to the end of the exemption period.

*Petition for Rulemaking and Request for a Comparability Finding*

In February 2019, Sea Shepherd Legal, Sea Shepherd New Zealand Ltd., and Sea Shepherd Conservation Society petitioned NMFS for an emergency rulemaking to ban the import of fish caught in gillnet and trawl fisheries in the Māui dolphin's range because the GNZ 2012 regulations allegedly were insufficient to protect the Māui dolphin. NMFS rejected the petition (84 FR 32853, July 10, 2019) on the basis that the GNZ had in place an existing regulatory program to reduce Māui dolphin bycatch and was proposing a revised regulatory program which, when fully implemented, would likely further reduce risk to Māui dolphin.

On May 21, 2020, Sea Shepherd New Zealand and Sea Shepherd Conservation Society (collectively, "Plaintiffs") initiated a lawsuit in the Court of International Trade (CIT) challenging NMFS' denial of its petition. On June 24, 2020, the GNZ announced its final fisheries measures for reducing bycatch of Māui dolphins (effective October 1, 2020) and its final Threat Management Plan (TMP). On July 1, 2020, Plaintiffs moved

for a preliminary injunction to ban imports of seafood into the United States from New Zealand's set-net and trawl fisheries. Before responding to Plaintiffs' motion for a preliminary injunction, NMFS moved for a voluntary remand in order to reconsider the Plaintiffs' petition for emergency rulemaking under the MMPA due to GNZ's final fisheries measures and final TMP.

On July 15, 2020, the GNZ, acting through the Ministry for Primary Industries, requested that NMFS perform a comparability assessment of the TMP and its regulatory program as it relates to Māui dolphins. On August 13, 2020, the CIT granted NMFS the voluntary remand. On August 27, 2020, NMFS received the Plaintiffs' supplemental petition, which both maintained the grounds for action outlined in the original petition and included new information on sightings of Māui dolphins, the final TMP and the 2020 LOFF.

#### *NMFS Determination on the Petition and the GNZ's Comparability Application*

NMFS rejected the supplemental petition to ban the importation of commercial fish or products from fish harvested in a manner that results in the incidental kill or incidental serious injury of Māui dolphins in excess of U.S. standards. Further, NMFS issued comparability findings for the West Coast North Island multi-species set-net and trawl fisheries because the GNZ has implemented a regulatory program governing the bycatch of Māui dolphin that is comparable in effectiveness to U.S. standards.

#### *Motion for Preliminary Injunction and Court Order*

Plaintiffs subsequently filed a Renewed Motion for Preliminary Injunction on December 11, 2020, seeking a preliminary injunction requiring the U.S. Government to ban the import of fish or fish products from any New Zealand commercial fishery that uses set-nets or trawl gear within the Māui dolphin's range.

On November 28, 2022, the CIT granted the plaintiffs' request for a preliminary injunction requiring the U.S. government, pending final adjudication of the merits, to ban

immediately the importation of certain fish and fish products from New Zealand commercial fisheries that use set-nets or trawls within the Māui dolphin's range. Under the CIT order, all (1) snapper; (2) tarakihi; (3) spotted dogfish; (4) trevally; (5) warehou; (6) hoki; (7) barracouta; (8) mullet; and (9) gurnard derived from the fisheries of the West Coast North Island are subject to the ban. The court also ordered NMFS to submit notice of the ban for publication in the *Federal Register* within 15 days. By granting this preliminary injunction and requiring the imposition of import restrictions and a comparability finding determination for the export fisheries operating on the West Coast North Island within the Māui dolphin's range, the judge's order effectively removes the currently operative exemption under 50 CFR 216.24 (h)(2)(ii) for these fisheries.

#### *Implementing Import Restrictions Under the Court Order*

The CIT order stipulates that specific fish products deriving from West Coast North Island multi-species set-net and trawl fisheries are prohibited from entry into the U.S market. Several of these fish species are not imported into the United States under Harmonized Tariff Schedule (HTS) codes that are specific to the type of fish. Instead, these fish are imported under non-specific fish and marine fish codes. Consequently, the list of affected HTS codes has been determined by NMFS and is available at:

<https://www.fisheries.noaa.gov/foreign/marine-mammal-protection/seafood-import-restrictions>. The list includes those non-specific HTS codes necessary to encompass the possible codes used for products subject to the trade restriction.

However, NMFS acknowledges that fish species harvested in the West Coast North Island fisheries are also harvested elsewhere in New Zealand and harvested with other fishing gear not subject to the court-ordered embargo. Consequently, further steps are needed to enforce an import restriction focused on fish harvested in the affected fisheries and included in the court order while not affecting trade in products not subject to embargo. NMFS must collect additional information from importers during the entry

process to identify products not subject to an import restriction. To that end, NMFS has identified tariff codes for the fish and fish products that require Certification of Admissibility to validate that the fish and fish products from New Zealand being offered for entry into the United States do not originate from West Coast North Island set-net and trawl fisheries.

On December 5, 2022, U.S. Customs and Border Protection (CBP) transmitted a user-defined rule to inspectors at affected ports of entry with instructions for port inspectors to examine entry filings from New Zealand under the specified tariff codes. Fish or fish products imported to the United States from New Zealand under the designated HTS codes that are not subject to the import prohibition must be accompanied by Certification of Admissibility. The Certification of Admissibility form and accompanying instructions for its use in entry filing are available at <https://www.fisheries.noaa.gov/foreign/marine-mammal-protection/seafood-import-restrictions>. The Certification of Admissibility is an information collection subject to the requirements of the Paperwork Reduction Act and has been approved by the Office of Management and Budget under control number 0648-0651.

Absent Certification of Admissibility, entry filings under the specified tariff codes will be rejected. Implementing this process will require notice to the trade community (importers and customs brokers) and CBP inspectors. NMFS is working with CBP to use its internal and external messaging systems for such notification. Also, consultations with the GNZ are needed to identify those officials authorized to certify shipments bound for the United States. NMFS initiated these steps prior to the effective date of the embargo.

Importers are advised to determine if other NMFS program requirements (*e.g.*, Tuna Tracking and Verification Program, Seafood Import Monitoring Program) or other agency requirements (*e.g.*, U.S. Fish and Wildlife Service, State Department, Food and Drug Administration) have Automated Commercial Environment (ACE) data reporting

requirements applicable to the designated HTS codes subject to certification under the MMPA import provisions. In such cases, the other reporting requirements still pertain in addition to the Certification of Admissibility requirements imposed to implement the CIT order.

Until such time as the CIT (or other court of competent jurisdiction) lifts the preliminary injunction, trade restrictions on the fish products harvested by set-nets and trawls operating off the West Coast North Island within the Māui dolphin's range will continue and Certification of Admissibility will be required for the HTS codes designated under this notice.

**Authority:** 16 U.S.C. 1361 *et seq.*

Dated: December 9, 2022.

**Samuel D. Rauch, III,**

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[FR Doc. 2022-27155 Filed: 12/15/2022 8:45 am; Publication Date: 12/16/2022]